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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CHRISTOPHER SAMUEL OLGUIN,<br>Defendant and Appellant. | E063459<br>(Super.Ct.No. FVI1203047)<br>O P I N I O N |

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant, Christopher Samuel Olguin, pled no contest to receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)),[1] violated probation, and was sentenced to two years in state prison. After completing his sentence, defendant petitioned to have his conviction redesignated a misdemeanor pursuant to Proposition 47, which the trial court denied.

On this appeal, defendant contends the trial court erred in finding that a violation of section 496d did not qualify for redesignation, as "[t]he broad language of Proposition 47 applies to receiving a stolen vehicle under section 496d." Defendant also contends the denial of his petition violated his equal protection rights. We reject both contentions and affirm the trial court's order denying the petition.

## II. PROCEDURAL BACKGROUND

On November 21, 2012, a felony complaint in case No. FVI1203047 charged defendant with receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a), count 1), to wit, a 1994 Geo Metro SD, having previously been convicted of violating Vehicle Code section 10851, subdivision (a) (Pen. Code, § 666.5). It was further alleged defendant had served two prior prison terms. (Pen. Code, § 667.5, subd. (b).)

On December 6, 2012, defendant pled no contest to the count 1 charge of receiving the stolen 1994 Geo Metro SD, and the prosecutor agreed to "dismiss [the] balance of [the] complaint," including the two prison prior allegations and the Penal Code

[1] All further statutory references are to the Penal Code unless otherwise indicated.

section 666.5 allegation that defendant had previously been convicted of violating Vehicle Code section 10851, subdivision (a). The trial court placed defendant on supervised probation for 36 months, with various terms and conditions, including that he serve 180 days in county jail.

Defendant's probation was revoked on February 1, 2013. On March 5, 2013, defendant pled guilty in case No. FVI1300352 to corporal injury to a cohabitant (§ 273.5, subd. (a)), and he admitted violating parole in the current case, case No. FVI1203047. On June 24, 2013, the trial court sentenced defendant in the current case to two years in state prison, with the sentence to be served concurrent to the two-year state prison sentence imposed in case No. FVI1300352. Defendant received custody credits in the current case of 150 actual days and 150 conduct days, for a total of 300 days.

On February 11, 2015, after completing his sentence, defendant filed a petition to have his section 496d, subdivision (a) conviction redesignated as a misdemeanor under Proposition 47. (§ 1170.18, subd. (f).) The People opposed defendant's petition on the ground that the "[c]onviction was for [Penal Code section] 496d[, subdivision] (a) which is not affected by Prop[osition] 47."

At the April 24, 2015 petition hearing, defense counsel represented to the trial court that "[his] research . . . indicates [the 1994 Geo Metro SD] is worth $942,"[2] and he argued that "Proposition 47 is broad enough to include [section 496d, subdivision (a)]."

[2] There is nothing in the record to confirm the value of the 1994 Geo Metro SD.

The trial court denied defendant's petition, explaining that its "reason for the denial of the petition is that Penal Code [section] 496d is not included under Prop[osition] 47."

## III. DISCUSSION

### A. *Standard of Review*

The construction of a ballot initiative such as Proposition 47 is a question of statutory interpretation, which is reviewed de novo. (*People v. Zeigler* (2012) 211 Cal.App.4th 638, 650; *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 548.) This appeal also requires us to decide whether the principles of equal protection require defendant's conviction for receiving a stolen motor vehicle be redesignated a misdemeanor, a question we review de novo. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1338.)

### B. *Overview of Proposition 47*

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 amended section 496 and added, among other statutory provisions, sections 490.2 and 1170.18. (*People v.*

*Lynall*, *supra*, at pp. 1108-1109.) The parties agree Proposition 47 did not specifically amend section 496d, subdivision (a).

Under section 1170.18, subdivision (a): "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." "If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code . . . ." (§ 1170.18, subd. (b).)

If the person seeking Proposition 47 relief has already completed his sentence, he or she "may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f); *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1329; *People v. Lynall*, *supra*, 233 Cal.App.4th at p. 1109.)

Under section 490.2, subdivision (a): "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of

the . . . property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." Under amended section 496, subdivision (a): "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained . . . shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year . . . ." Under the former version of section 496, the People had discretion to charge the offense as a misdemeanor if the value of the stolen property did not exceed $950, and if the district attorney or grand jury determined that charging the crime as a misdemeanor would be in the interests of justice. (Former § 496, amended by Stats. 2011, ch. 15, § 372, p. 417.)

C. *Applicability of Proposition 47 to Section 496d*

As noted, defendant was sentenced to two years in state prison after pleading no contest to violating section 496d, subdivision (a), and then subsequently violating probation. Section 496d, subdivision (a) states, in relevant part, that "[e]very person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or

both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both."

Although defendant concedes Proposition 47 "did not specifically amend section 496d, subdivision (a)," he asserts "the exclusion of section 496d from Proposition 47 was an oversight," as "[t]he broad language of Proposition 47 applies to receiving a stolen vehicle under section 496d." Specifically, he contends that since section 490.2's "new classification of theft includes theft of vehicles under section 487, subdivision (d)(1))," "[i]t is unreasonable to conclude the electorate intended to reclassify receiving *any* stolen property valued at $950 or less, including a stolen vehicle, under section 496[, subdivision] (a), as well as theft of such a vehicle under section 487[, subdivision] (d)(1), but did not intend to reclassify receiving a stolen vehicle under section 496[, subdivision] (d)." We reject defendant's contention, as a violation of section 496d is not subject to reclassification or redesignation under Proposition 47.

In interpreting a voter initiative such as Proposition 47, "we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v.*

*Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571; see *People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1100.) The long-standing rule of statutory construction is that "when the Legislature has chosen to expressly include certain things in a statute, it means to exclude those it has not mentioned." (*People v. Walker* (2000) 85 Cal.App.4th 969, 973; *People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001; *People v. Brun* (1989) 212 Cal.App.3d 951, 954.) "'[I]nsert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.] This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not "insert what has been omitted" from a statute.' [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 587; accord, *People v. Harbison* (2014) 230 Cal.App.4th 975, 982.) More recently, this court concluded that a defendant is ineligible for Proposition 47 relief based on a conviction for violating section 496d, "because section 496d is not included in section 1170.18," and because "there is no indication that the drafters of Proposition 47 intended to include section 496d." (*People v. Varner* (Sept. 15, 2016, E063389) ___ Cal.App.5th ___ [2016 WL 4917366].)

Since section 1170.18, subdivisions (a) and (b) expressly include certain theft-related offenses, we presume the intent of the voters, and of the Legislature, was to exclude other theft-related offenses, such as section 496d, that were not specifically included under Proposition 47. We do not presume, as defendant asserts, that "the exclusion of section 496d from Proposition 47 was an oversight . . . ." To construe

Proposition 47 as including section 496d would be inconsistent with our Supreme Court's instruction that we not "add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court (Pearson), supra*, 48 Cal.4th at p. 571; see *People v. Guzman*, *supra*, 35 Cal.4th at p. 587; *People v. Varner*, *supra*, ___ Cal.App.5th ___ [2016 WL 4917366].)

Additionally, in order to be eligible for resentencing, defendant must be a person "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of the offense. (§ 1170.18, subd. (a).) Defendant is not such a person. Although we recognize the language, "any property," included in section 496, subdivision (a), is broad enough to encompass a stolen vehicle, Proposition 47 left intact the language in section 496d that makes a violation of that statute a wobbler. (§§ 17, subds. (a), (b), 496d, subd. (a).) On the other hand, section 496, subdivision (a), as amended by Proposition 47, now requires the district attorney to charge the crime as a misdemeanor if the stolen property does not exceed $950.

In the instant case, Proposition 47 does not operate to reduce defendant's sentence because the prosecutor had the discretion to prosecute defendant's section 496d crime as either a felony or a misdemeanor, even after the passage of Proposition 47, and regardless of the value of the motor vehicle. Thus, although defendant "could have been" guilty of a misdemeanor for violating section 496d, subdivision (a) had the People elected to prosecute the charge as a misdemeanor, defendant is not a person "who would have been

guilty of a misdemeanor" had Proposition 47 been in effect at the time of the offense. (§ 1170.18, subd. (a).)

Language in other portions of Proposition 47 supports this conclusion. Section 490.2, subdivision (a), which was added by Proposition 47, provides a definition of petty theft, which begins with the phrase: "Notwithstanding Section 487 or any other provision of law defining grand theft . . . ." Similarly, section 459.5, which was also added by Proposition 47, provides a definition of shoplifting, which begins with the phrase: "Notwithstanding Section 459 [burglary] . . . ." This "notwithstanding" language is notably absent from section 496. Because section 496 contains no reference to section 496d, and since Proposition 47 did not amend section 496d to require sentencing as a misdemeanor, it is reasonable to assume the drafters intended section 496d to remain intact as a wobbler, with the prosecution retaining discretion to charge a section 496d offense as either a felony or a misdemeanor. The absence of any reference in Proposition 47 to section 496d, including in the list of crimes eligible for resentencing, shows that section 496d was intended to remain beyond Proposition 47's reach. (See *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168; see *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852; see *People v. Sanchez, supra,* 52 Cal.App.4th at p. 1001.) We therefore conclude defendant's section 496d, subdivision (a) conviction does not qualify for redesignation under Proposition 47.

D. *Equal Protection*

Defendant next contends that, assuming Proposition 47 applied to section 496, subdivision (a) but not to section 496d, subdivision (a), "then [Proposition 47] results in disparate treatment in violation of the [e]qual [p]rotection clauses of the federal and California [C]onstitutions." Following our conclusion in *People v. Varner*, *supra*, ___ Cal.App.5th ___ [2016 WL 4917366], we reject defendant's contention.

The Constitutions of both the United States and California guarantee equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) However, the California Supreme Court instructed that "[a] defendant . . . 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Therefore, the rational basis test is applicable to an equal protection challenge involving "'an alleged sentencing disparity.'" (*Ibid.*) The rational basis test also applies to an alleged statutory disparity: "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose."' [Citation.]" (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.)

In *Johnson*, the court explained that application of the rational basis standard "'does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated.

[Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in "'rational speculation'" as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record."' [Citation.] To mount a successful rational basis challenge, a party must '"negative every conceivable basis"' that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its '"wisdom, fairness, or logic."' [Citations.]" (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 881.)

Here, defendant argues "[i]t is irrational to grant misdemeanor treatment to those convicted under section 496 and to deny misdemeanor treatment to those convicted under section 496d. It seems implausible that the voters, who expressly reduced the punishment for stealing (§ 487[, subd.] (d)(1)) or receiving (496[, subd.] (a)) a low-value car to a misdemeanor, meant to punish receiving the same stolen car under section 496d more severely." However, there are plausible reasons for treating sections 496 and 496d differently. For example, as the People maintain, "[u]nlike other forms of stolen property, stolen vehicles are often dismantled and sold for parts in 'chop shops' which can raise their worth above retail value. [Citation.] Also, owners of vehicles are typically dependent on those vehicles for necessities, which is not frequently the case with the theft of other forms of property. [Citation.]" (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998 ["This proposal would add a section to the Penal Code to

encompass only motor vehicles related to the receiving of stolen property. . . ."].) The Legislature explicitly added section 496d to the Penal Code in order to provide "additional tools to law enforcement for utilization in combating vehicle theft and prosecuting vehicle thieves. Incarcerating vehicle thieves provides safer streets and saves Californians millions of dollars. These proposals target persons involved in the business of vehicle theft and would identify persons having prior felony convictions for the receiving of stolen vehicles for enhanced sentences." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390, *supra*, as amended June 23, 1998.)

Another plausible reason for the disparity from excluding a section 496d conviction from qualifying for resentencing under Proposition 47 is the probable intent not to eliminate prosecutorial discretion to charge a section 496d offense as either a felony or misdemeanor. Our Supreme Court has ruled that "numerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, '"one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]"' the defendant cannot make out an equal protection violation. [Citation.]" (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 838-839.)

"'[W]hen conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made.' [Citation.] 'A classification is not arbitrary or irrational simply because there is an "imperfect fit between means and ends"' [citations], or 'because it may be "to some extent both underinclusive and overinclusive"' [citation]." (*Johnson v. Department of Justice, supra,* 60 Cal.4th at p. 887.) Because there are plausible reasons for distinguishing between section 496d, subdivision (a) offenses on the one hand, and section 496, subdivision (a) offenses on the other hand, defendant has not established any violation of equal protection in failing to extend reclassification to section 496d, subdivision (a) offenses.

## IV. DISPOSITION

The trial court's order denying defendant's petition for resentencing is affirmed.

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RAMIREZ
P. J.

I concur:

McKINSTER
J.

Slough, J., Concurring.

I agree with the majority's conclusion that convictions for receiving stolen motor vehicles under Penal Code section 496d[1] are not eligible for resentencing under Proposition 47, and I agree with the majority's analysis, with one exception.

The majority concludes section 496d is not a qualifying offense under Proposition 47 because it is not listed in section 1170.18, subdivisions (a) and (b). (Maj. opn., *ante*, at p. 8.) This misinterprets the statute. There is no list of eligible offenses that qualify for resentencing in section 1170.18 or anywhere else in Proposition 47. Section 1170.18 contains a list of the sections Proposition 47 added or amended that change the penalties for substantive theft-related and drug possession crimes. Numerous statutory sections setting forth substantive offenses that are eligible for resentencing do not appear in that list, including sections 487 (grand theft), 459 (burglary), 476 (forgery, counterfeiting), and 504 (embezzlement). The exclusion of section 496d from the list of new and amended *punishment provisions* that appear in section 1170.18 therefore says nothing about whether section 496d is an *eligible offense*.

To decide whether an offense is eligible, the courts cannot look to section 1170.18, but rather must examine the statutory provisions setting out substantive offenses and determine whether the petitioner *would have been guilty of a misdemeanor* if Proposition 47 had been in effect at the time of the offense. (§ 1170.18, subd. (a).) The majority

[1] Unlabeled statutory citations refer to the Penal Code.

undertakes this analysis as additional support for its holding and concludes defendant would not have been guilty of a misdemeanor if Proposition 47 had been in effect at the time of his offense. (Maj. opn., *ante*, at pp. 9-10.) I agree with this aspect of the majority's analysis, but write separately because I view it as the dispositive analysis for Proposition 47 redesignation cases.

SLOUGH
J.